

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOSEPH M. WALLS,  
Petitioner,

V.

WARDEN THOMAS CARROLL,  
Respondent.

NO.

05-585-



MEMORANDUM OF LAW  
and  
APPENDIX

in support of

WRIT OF HABEAS CORPUS

August 5, 2005

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STATEMENT OF THE CASE

It is alleged that in 1985 the Defendant (Mr. Joseph M. Walls) and his co-defendant (Mr. Efrain Hernandez) were involved in citizen vigilance committee activities, taking direct action against notorious drug dealers in New Castle County, State of Delaware. These vigilance actions consisted of breaking into the buildings of known drug dealers, assaulting the male occupants thereof, and depriving them of their drug profits and poisons.

Relevant to the current case are the alleged citizen vigilance committee actions against a drug syndicate controlled by Jeffrey Pancoast and Dmytro Sherchenko — two notoriously active drug dealers who operated a dangerously violent methamphetamine and marijuana franchise out of their family home in Newport Delaware [both of whom, it was latter determined, were known to and protected by the Newport or New Castle County police departments as "confidential reliable informants"].

On the evening of December 14, 1985, the Pancoast / Sherchenko drug gang was having one of their routine drug parties at their Newport lair. Defendant and Mr. Hernandez waited and watched, from a vehicle parked down the street, as members of the Pancoast / Sherchenko drug gang noisily stumbled out into the public street and departed.

When it appeared that the last of the drug gang's soldiers had left, Defendant and Mr. Hernandez prepared to take action. With great stealth, Defendant and Mr. Hernandez cautiously approached the building, peered through the front window of the Pancoast / Sherchenko drug den and observed that the drug leaders were settled down on a couch in an apparant drug induced stupor, and noticed drugs and drug paraphernalia strewn about the room.



Defendant and Mr. Hernandez burst into the drug den. Defendant possessed a small lightweight red aluminum No. 4 little league baseball bat (A-4-5; A-15). Mr. Hernandez possessed a small handgun (A 1-2; A-15).

Defendant struck Pancoast (A-4) and Sherchenko (A-3-4) while screaming at them about their drug pushing and letting them know that it was no longer safe for the Pancoast/Sherchenko drug syndicate to push their poisonous narcotics upon the otherwise safe family friendly Newport Community (A-5). At the same time, Defendant further "humiliated" these "big time drug bosses" by forcing both Boss Pancoast (A-2) and Under Boss Sherchenko (A-2) to empty their pockets (as they had done to so many of their "victims"). In this way the Pancoast/Sherchenko drug syndicate was deprived of their drug revenue and their poisonous narcotics, and the apparent safety of their drug lair.

These are the facts and motivations for attacking the Pancoast/Sherchenko drug syndicate's principles on the evening of December 14, 1985.

As a result of these citizen vigilance committee actions, Defendant was arrested, tried, and ultimately sentenced to a combined 62 years in prison. Defendant's direct appeal (A-23, #54), first partconviction motion (A-23, #58; A-24, #62), appeal thereof (A-25, #73), state writ of habeas corpus (A-267; A-272), and federal writ of habeas corpus were denied (A-248, A-278, A-308).

The federal questions sought to be reviewed were first raised and denied in the second partconviction motion (A-25, #80; A-30), raised and denied on appeal and on reargument/rehearing (A-28; A-29), and on certiorari (A-316). This is Defendant's petition for writ of habeas corpus from the state court's denial of these federal questions.

GROUND ONE  
REASON FOR GRANTING THE PETITION

THE DEADLY WEAPON AND  
ASSAULT CONVICTIONS FOR  
POSSESSING OR USE OF A  
COMMON BASEBALL BAT  
VIOLATES LEGISLATIVE  
INTENT, EX POST FACTO, AND  
DUE PROCESS

The standard and scope of review  
applicable to this argument is :

- a) whether State courts are expected to comply with the federal courts' interpretations of the federal ex post facto and due process clauses;
- b) whether use of a post-trial change in the law, which expanded the definition of a deadly weapon, to criminalize "use" of a baseball bat, violates ex post facto or due process; and
- c) whether clearly expressed legislative intent, that a "baseball bat" was not a deadly weapon during the time this crime was committed, exposes a clear ex post facto or due process violation.

Defendant's weapon based convictions for "use" of a  
baseball "bat", when the Delaware General Assembly specified that  
a "baseball bat" was not a deadly weapon at the time of

Defendants' crime, violates clear legislative intent, proves actual innocence, and violates both ex post facto and due process.

#### A. SUPREMACY CLAUSE VIOLATED

These proceedings involve a question of exceptional importance in that a clear constitutional violation was proven, yet the state courts refused to either consider or comply with this Court's ex post facto or due process decisions.

The United States Constitution clearly specifies that this Court's "judicial Power shall extend to all cases... under the Constitution", U.S. Const. Art. III, sec. 2, and that:

This Constitution, ... shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby

U.S. Const. Art. VI, cl. 2. In compliance therewith, courts have recognized the "Supremacy" of this Court's interpretation of the constitution since the founding of the United States. <sup>①</sup> Marbury v. Madison, 1 Cranch 137 (1803) (courts bound by Constitution); Elmendorf v. Taylor, 23 U.S. 152 (1825).

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① see also Hamilton's Federalist #80 ("third point. Controversies between the nation and its members or citizens can only be properly referred to the national tribunals"), and Federalist #81 ("that there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested", "the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution").

Citizens of these United States have always looked to this Court to require State courts to comply with this Court's interpretation of federal constitutional law, and to enforce uniformity with this Court's precedent.<sup>②</sup> In this case, there is a clear conflict between the States' approval of a retroactive expansion of substantive criminal law to sustain Defendants' "deadly weapon" convictions and this Court's ex post facto and due process precedent. Thus, in the interest of federalism, this Court is asked to resolve this conflict. 28 U.S.C. 2254(a)(d).

### B. EX POST FACTO VIOLATED

The Ex Post Facto clause prevents state legislatures from retroactively altering the definition of crimes to expand the range of conduct prohibited. U.S. Const. Art. I, sec. 10; Amend. 5, 6, 14.

#### 1. DEADLY WEAPON INDICTMENTS

Defendant was indicted on March 19, 1986 upon several charges for possession or use of a baseball bat, including one count of Possession of a Deadly Weapon During Commission of a Felony (PDW) and two counts of Assault 2nd degree (Assault). 11 Del. C. 612, 1447 (A-3-A-5).

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② see Federalist #80 ("Second point... the mere necessity of uniformity in the interpretation of the national laws, decides the question."), and Federalist #81 ("the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals").

The Indictment specified that the deadly weapon in the charges was a common baseball "bat":

did knowingly possess a deadly weapon during the commission of a felony by possessing a bat, a deadly weapon, during the commission of Assault Second degree, ....

Indictment, IN86-03-1211, Count VIII (A-4, 5); and

did intentionally cause physical injury ... by striking him with a bat, a deadly weapon.

Indictment, IN86-03-1208, -1210, Courts VI, VII (A-3, 4).

Defendant was tried on October 6, 1986, was convicted and was sentenced to 15 years (for the PDW) and 8 years (4 yrs for each Assault) for a total of 23 years in prison (A-18, #12; A-21, #37).

## 2. POST-TRIAL EXPANSION OF DEADLY WEAPON DEFINITION

At the time Defendant's crime was committed (in 1985), Delaware law defined a "deadly weapon" to mean:

any weapon from which a shot may be discharged, a knife, billy, blackjack, bludgeon, ....

Delaware Criminal Code with Commentary, 1973, p. 24 (A-7) (hereafter "DE Code Commentary").

It was not until July 14, 1992 (six years after the crimes were committed in December 1985) that the Delaware General Assembly expanded the definition of what constituted



a "deadly weapon" by including therein:

any dangerous instrument ... used to cause death or serious physical injury....

68 Del. Laws, c. 378, sec. 2 (A-14) (emphasis added). Johnson v. State, 711 A.2d 18, 26-28 (Del. 1998) (explaining history of weapon statute and expansion of deadly weapon definition).

### 3. BASEBALL BAT EXCLUDED

The Synopsis to 68 Del. Laws c. 378 clearly explained that the July 14, 1992 change in the law was intended to expand the definition of what is a deadly weapon by including within the definition instruments of crime that are otherwise considered common objects. Taylor v. State, 679 A.2d 449, 454 (Del. 1996) ("intended to add to the specific list of deadly weapons", by adding otherwise "common objects" that maybe used to commit crimes).

The Synopsis explained that:

In the recent past, a number of brutal ... assaults have been committed with common objects such as ... baseball bats, ... Because of a loophole in our current law, the defendant could not be convicted with Possession of a Deadly Weapon During the Commission of a Felony [11 Del. C. 1447]

(A-14) (emphasis added).

When the Delaware General Assembly amended the deadly weapon statute, by materially expanding the definition of a



deadly weapon to specifically include a "baseball bat", rules of statutory construction create a presumption that an enlargement in the meaning of the statute was intended. In making this material change, the Delaware General Assembly's action can neither be assumed to be without significance nor to have committed an oversight or to have acted inadvertently. DiSabatino v. State, 808 A.2d 1216, 1227 (Del. Super. 2002) (looking to Synopsis for legislative intent); Walton v. State, 821 A.2d 871, 876 (Del. 2003) (courts not legislative body).

By specifying that a "baseball bat" was not previously included within the definition of a deadly weapon prior to July 14, 1992, the Delaware General Assembly made clear its intent that at the time of defendant's crime (in 1985) a baseball "bat" was not a deadly weapon.<sup>③</sup>

In other words, the Delaware General Assembly made clear its intent that the 1992 amendment was a substantive expansion of the law, that altered the range of conduct the statute punished. Thus, to rely upon the 1992 expansion of the deadly weapon definition to now include a "baseball bat" violates Ex Post Facto. U.S. Const. Art. I, sec. 10; Amend. 5, 14; Stugner v. California, 123 S.Ct. 2446, 2449 (2003) (explaining the "fair warning"

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③ The Delaware General Assembly referred to this as a "loophole" (A-14): a means of evading or escaping liability. see Black's Law Dictionary.

prohibition of Ex Post Facto); Pleasanton v. State, 817 A.2d 791, 792 (Del. 2003) (Ex Post Facto to apply statute retroactively); Collins v. Youngblood, 110 S.Ct. 2715, 2718-20 (1990) (explaining original understanding of Ex Post Facto<sup>④</sup>); Stugner v. California, 123 S.Ct. 2446, 2449 (2003) (same); Carmell v. Texas, 120 S.Ct. 1620 (2000) (same).

### C. DUE PROCESS VIOLATED

While the Ex Post Facto clause precludes state legislatures from retroactively altering the definition of crimes, state courts are also "barred by the Due Process clause from achieving precisely the same result by judicial construction." Bowie v. Columbia, 84 S.Ct. 1697, 1702-03 (1964); Fiore v. White, 121 S.Ct. 712, 713-14 (2001) (retroactively applied court decision violates due process); U.S. Const. Amend. 5, 6, 14.

#### 1. "USE TEST" VIOLATION

To deny the postconviction motion, the Delaware Courts relied upon the "use test" :

The Supreme Court of Delaware has held that it is the use of the bat which qualifies it as a deadly weapon and "when a baseball bat is used as a bludgeon . . . , a baseball bat becomes a deadly weapon."

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④ see Collins, 110 S.Ct. at 2720; citing Declaration of Rights and Fundamental Rules of the Delaware State, sec. 11 (1976) [now Del. Const. Art. 1, sec. 7].

Order, pp. 2-3, n. 10, citing Anderson<sup>⑤</sup> and Warren<sup>⑥</sup> (A-31-A-32).

a. Neither Anderson or Warren  
were Foreseeable Changes

Defendants' crimes were committed in 1985 (A-4-5). The crimes in Anderson were committed in 1991 (or six years after Defendants' crimes). The crimes in Warren were also committed in 1991 (again six years after Defendants' crimes).

Defendant was tried in 1986 (A-18). The Anderson case was decided in 1992 (or six years after Defendant's trial). And, the Warren case was decided in 1993 (or seven years after Defendant's trial).

Given these facts this Court should recognize that neither Anderson or Warren were "foreseeable" at the time Defendants' crimes were committed.

b. DE Legislature Rejected "Use Test"

The DE Code Commentary specifies that:

The definition of "deadly weapon" is more narrow than that given in present<sup>⑦</sup> Delaware law. The present<sup>⑧</sup> Delaware meaning of that term is more like the meaning given to "dangerous instrument." ... Possession of a truly deadly weapon may be treated in such a scheme as a more serious offense than possession of a dangerous instrument.

⑤ State V. Anderson, 1992 WL 353826 (Del. Supr. 1992) (A-34).

⑥ Warren V. State, 1993 WL 132986 (Del. Supr. 1993) (A-36).

⑦ In this case "present" refers to the law before the 1973 revision of the Delaware criminal code.

⑧ Id.

DE Code Commentary (1973), p. 26, citing Wisniewski v. State, 138 A.2d 333 (Del. 1957) (A-8). See also Wallace v. Nash, 311 F.3d 140, 144 (2nd Cir. 2002) (explaining that "truly deadly weapon" are "limited to items that have inherent potential use as implements of aggression").

Wisniewski is the source of the "use test":

In case of doubt the question as to whether or not an instrument constitutes a deadly weapon depends to a large extent upon the manner in which it was used.

138 A.2d at 341-42 (emphasis added).

In other words, prior to the 1973 revision of the entire Delaware Criminal Code (to bring Delaware criminal laws into compliance with the Model Penal Code), the broader Wisniewski "manner in which" a common object "was used" test, to determine when a common object (like a baseball bat) became a deadly weapon, was the controlling standard.

However, by specifically rejecting the Wisniewski test, the DE Code Commentary (1973) makes the Delaware legislature's intent clear: that after the 1973 revision, the inclusive Wisniewski common object "manner of use" test was no longer valid. DE Code Commentary (1973), p. 26 ("is more narrow than" Wisniewski) (A-8).

#### c. "Use Test" Revived Post-Trial With 1992 Expansion

It was not until the 1992 expansion of the deadly weapon definition that the Delaware legislature added back into the

"deadly weapon" definition the "common object" and "manner of use" test of Wisniewski. Johnson, 711 A.2d at 27 ("the definition of deadly weapon is again expansive"); Taylor, 679 A.2d at 454 (same).

### SUMMARY

Courts have repeatedly cautioned that no court is free to usurp the role of the legislature, as was done by the judicial activist in this case. By re-injecting the "use test" back into the deadly weapon definition, without and contrary to legislative action or intent, the State courts violated fundamental principles of statutory construction. State V. Dickerson, 298 A.2d 761, 767-69 (Del. 1972) (courts can not expand legislative intent); State V. Spence, 367 A.2d 983, 990 (Del. 1976) (same); Fidelity Deposit V. Dept. Admin. Serv., 830 A.2d 1224, 1228-29 (Del. Ch. 2003) (court may not engraft upon a statute language clearly excluded therefrom). But, that is exactly what the state court did in this case. Order, p. 2 (A-31) ("manner in which you used", "use of the bat", "used as a bludgeon") (emphasis added).

By applying the unreported Anderson and Warren decisions to Defendant's crimes the Delaware courts applied an unforeseeable interpretation of the law, to a crime that occurred over six years before those opinions were made, in a manner that disadvantaged Defendant in violation of Defendants' Due Process rights. U.S. Const. Amend. 5, 14; Bouie, 84 S.Ct. at



1702-03 (non-retroactivity principle); State v. LeCompte, 538  
A.2d 1102 (Del. 1988) (same); Fiore, 121 S.Ct. at 714 (due process  
violation); Dickerson, 298 A.2d at 767-69 (same).



GROUND TWO  
REASON FOR GRANTING THE PETITION

THE ROBBERY FIRST DEGREE  
CONVICTIONS, FOR DISPLAYING  
A HANDGUN, VIOLATES CLEAR  
LEGISLATIVE INTENT AND  
DUE PROCESS

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The standard and scope of review  
applicable to this argument is:

- a) whether state courts are expected to comply with federal court interpretations of federal due process rights; and
- b) whether clearly expressed legislative intent, that criminal liability must be limited to the aggravating facts and degree of crime Defendant is personally accountable for, prove actual innocence and violation of due process.

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Defendants' convictions for the co-defendants' display of a handgun, resulting in enhanced sentencing for aggravated robbery, violates Delaware's limited liability statute, violates clear legislative intent, proves actual innocence on the aggravating element, and violates due process.

A. SUPREMACY CLAUSE VIOLATED

Defendant incorporates by reference herein, Ground One, part A, pp. 4-5 and notes 1-2, supra.

In this case, there is a clear conflict between the State's approval of a verdict and sentence based upon insufficient evidence (i.e., no personal "accountability" or display of the "handgun") and the federal courts' due process insufficient evidence precedents. Thus, in the interest of federalism, this Court is asked to resolve this conflict. 28 U.S.C. 2254(a)(d).

### B. DUE PROCESS VIOLATED

The due process clause prevents the conviction and sentence of an innocent man when the state fails to prove all the elements of the crimes charged. U.S. Const. Amend. 5, 6, 14.

#### I. ROBBERY INDICTMENT

Defendant was indicted on March 19, 1986 upon several charges which included two counts of Robbery First degree in violation of 11 Del.C. 832. The Indictment specified that the two Robbery charges depended upon the accomplice's actions:

When in the course of the commission of the crime, Efrain Hernandez displayed what appeared to be a deadly weapon, to wit:  
a handgun.

Indictment, IN 86-03-1205, -1206, Counts 2, 3 (A-1-2).

Defendant was tried on October 6, 1986, was convicted, and was sentenced to 10 years on each Robbery (for a total of 20 years in prison) (A-12, A-21).

## 2. LIABILITY LIMITS

Under Delaware statutory law, a person is guilty of an offense committed by another person, 11 Del.C. 271. However, there are limits placed upon the extent of this liability. Specifically, 11 Del.C. 274, which states:

When, pursuant to sec. 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible ... with his own accountability for an aggravating fact or circumstances.

11 Del.C. 274(A-10) (emphasis added).

The DE Code Commentary makes the legislative intent clear:

This section ... [requires] imposition of a deserved penalty no matter what penalty the other parties received. It allows one party to be convicted of first-degree [robbery], for example, when the other's [accountability for the aggravating fact] makes him guilty only of second-degree [robbery] ... The proper test is the actor's personal [accountability].

DE Code Commentary (1973), pp. 52-53 (A-10).

## 3. ONLY ROBBERY SECOND PROVEN

The Indictment charged Defendant with committing Robbery. Robbery is "divided into degrees" by statute. The difference between Robbery Second degree and Robbery First degree is that Robbery First degree requires the additional "aggravating" element of a weapon. Compare 11 Del.C. 831 with 11 Del.C. 832(2). (A-11, 13).

Cf. Davis v. State, 400 A.2d 292, 296 (Del. 1979) ("robbery is presumed to be in the second degree").

The Indictment specified that the weapon involved in this crime was a "handgun" and specified that only the accomplice displayed that "handgun". Indictment, counts 2, 3 (A-1, 2; specifying the accomplice's name as "Efrain Hernandez"). The State's trial theory was that Defendant's liability was based upon the display of a "handgun" by the accomplice. The trial evidence clearly supports the fact that only the accomplice displayed the "handgun" (A-15). Thus, the Indictment, the State's trial theory, and the trial evidence all support only one conclusion — that Defendant was not in possession of and did not display the "handgun" during the commission of the robberies.

#### a. Sec. 274 Two Pronged Test

The State Court refused to consider the Due Process mandate to consider that "sections 271 and 274 require [a] two-part analysis when the State proceeds on a theory of accomplice liability." First, "whether the State has established that the defendant was an accomplice", and, second, "if that offense is divided into degrees, then... what degree of the offense the defendant committed." Johnson, 711 A.2d at 30. Order, pp. 3-4 (A-32, 33).

##### (i) First Prong "Accomplice" Conceded

The State Court failed to consider that the State conceded before the Courts that Defendant's Robbery convictions were

predicated upon accomplice liability.<sup>⑨</sup> Thus, sec. 274's first prong is not an issue.

(ii) Second Prong "degree" test

The State Courts also failed to consider that sec. 274's second prong is further divided: (a) is the "offense divided into degrees", and (b) what degree of the offense the defendant committed. Johnson, 711 A.2d at 30.

(a) Robbery is Divided into Degrees

The State Courts failed to consider that Delaware has long recognized that "Robbery is an offense that is divided into degrees." Davis, 400 A.2d at 296; Herring v. State, 805 A.2d 872, 874 (Del. 2002).

(b) Only Robbery Second Degree Proven

The State Courts failed to consider the mandate that determining what degree of crime Defendant committed required an "individualized determination of the defendants' mental state and<sup>⑩</sup> culpability for any aggravating fact or circumstances." Johnson, 711 A.2d at 30.

The State Courts failed to consider that it was this second stage of the sec. 274 second prong analysis that the State failed to prove at trial. Specifically, the State did not and could not prove that Defendant was "accountable" for the

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⑨ Failure to brief (or respond) concedes issue.

⑩ see State v. Klosowski, 310 A.2d 656, 657 (Del. Super. 1973) ("In its commonly accepted meaning 'and' is a connective, and is not generally used to express an alternative"); Williams v. State, 818 A.2d 906, 912 (Del. 2002) (same).



"handgun" that "aggravated" the crime of Robbery Second degree to Robbery First degree as alleged in the Indictment and at Trial.

### SUMMARY

The State Courts refused to consider that the Due Process clause forbids a state from convicting a person for a crime without proving all the elements of the crime; that this is a core fundamental constitutional right. In re Winship, 397 U.S. 358, 364. Due process was violated in this case when Defendant was convicted for being "armed with a deadly weapon" under 11 Del.C. 832(2) [(A-1, A-2: the "handgun")] without the State proving that Defendant was "armed" with the "handgun". Fiore v. White, 121 S.Ct. 712, 714 (2001) (due process).

In this case, the State did not limit Defendant's liability. Since the evidence proves that Defendant was not "accountable" for the "aggravating fact" (the "handgun") which elevated Robbery Second degree to Robbery First degree, pursuant to 11 Del.C. 274 and Due Process, Defendant can be held liable for only Robbery Second degree; which more accurately reflects the extent of Defendant's "own accountability for [the] aggravating fact." DE Code Commentary (1973), pp. 52-53 (A-10); Jackson v. Virginia, 99 S.Ct. 2781 (1979) (Due Process); In re Winship, 397 U.S. 358 (1970) (elements test); 11 Del.C. 301(b). Compare Sawyer v. Whitley, 112 S.Ct. 2514, 2520-22 (1992) (discussing "proof or disproof of aggravating circumstances" to limit liability).



## CONCLUSION

Actual innocence is a default provision that permits a petitioner to seek relief if he was otherwise procedurally barred under habeas law. Such a waiver is available in this case because of the constitutional violation that resulted from the convictions which were had upon crimes that were not proven at trial. Dretke v. Haley, 124 S.Ct. 1847, 1854 (2004) (factual innocence and imposition of an unauthorized sentence is miscarriage of justice), citing Thompson v. Louisville, 80 S.Ct. 624, 629 (1960), Jackson, 99 S.Ct. 2781, and Wainwright v. Sykes, 92 S.Ct. 2497 (1977); Schlup v. Delo, 513 U.S. 298, 316, 327-28 (1995) (actual innocence "freestanding" claim, "gateway" claim, or "innocence of" aggravating factor claim excuses default), at 323 ("no reasonable juror would have found" guilt test); Herrera v. Collins, 506 U.S. 390 (1993) (White, J., concurring) at 429 ("no rational trier of fact could [find] proof of guilt beyond a reasonable doubt" proves actual innocence), citing Jackson, 443 U.S. at 316, 324 ("no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof [on]...the existence of the elements of the offense"); Wilson v. Vaughn, 304 F.Supp.2d 652, 656 (E.D. Pa. 2004) (Third Circuit recognizes that petitioners may rely upon either existing record or new evidence, in actual innocence claims).

Defendant recognizes that it is not the province of federal habeas courts to re-examine a state court determination on  
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purely state law questions; that in conducting habeas review, federal courts are limited to deciding whether a conviction has violated the constitution of the United States, 28 U.S.C. 2241, 2254; Estelle v. McGuire, 112 S.Ct. 475 (1991). However, in doing so, this Court must scrutinize the definitions and constructions of the applicable criminal acts to determine if federal constitutional violations have resulted: for the Courts have cautioned, since Mullaney, that a state must not be allowed to "manipulate its way out of Winship." Jones v. U.S., 526 U.S. 227, 240 (1999); Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975) (cautioning that a state court interpretation of state law can be re-examined when it "appears to be an obvious subterfuge to evade consideration of a federal issue"); Bouie, 378 U.S. at 354 (heart of Bouie analysis is "scrutiny" of the "definition and construction" of state criminal act).

Defendant raised both Ground One and Ground Two before the state courts in his postconviction motion and in the appeal thereof. In doing so, Defendant specifically claimed violations of the U.S. Constitution Due Process and Ex Post Facto clauses and federal court interpretations of these U.S. Constitution clauses (A-30). However, when denying Defendant's claims, the state courts refused to assess the merits of these U.S. Constitution claims for relief (A-31-33; A-28; A-29). Under habeas law, this court must defer to the state courts' determination of the

federal issues unless those determinations are contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. 2254(d)(1). Lockyer v. Andrade, 123 S.Ct. 1166 (2003). In reviewing a state courts' summary denial of the state appeals, this court must "look through" the summary dispositions (A-28, A-29) to the last reasoned decision (A-30). Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). Where, as here, the state courts did not assess the merits of the federal claims, the deference due under habeas law does not apply. Everett v. Beard, 290 F.3d 500, 508 (3rd Cir. 2002), citing Williams v. Taylor, 120 S.Ct. 1495 (2000) (O'Connor, J., concurring); Mapler v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003). Therefore, this Court may, first, look to see how the state has defined the applicable criminal statutes; second, determine what limits are placed upon their applicability; and, third, determine whether the convictions conform with constitutional mandates.

The Grounds for relief raised herein prove that the state courts refused to even consider that when the state fails its burden of proof on any element, the Defendant must be acquitted. In this case, the state failed its "burden of production" as required by 11 Del.C. 301(a) and Due Process; and the "beyond a reasonable doubt" required by 11 Del.C. 301(b) and Due Process, as expanded by 11 Del.C. 222(5), 274 (1985). Specifically, sec 222(5) required the state to prove that

the "common object" (the "baseball bat") that Defendant possessed (11 Del.C. 1447) or used (11 Del.C. 612) was within the definition of a deadly weapon (A-3-5); and, sec. 274 required the state to prove Defendant's "individualized" "accountability" for the "handgun" (the "aggravating fact or circumstances") that enhanced Robbery Second degree [11 Del.C. 831(2)] to Robbery First degree [11 Del.C. 832(2)] (A-1, A-2). Because these Winship violations undermined the legality, integrity and fairness of the proceedings leading to the conviction, and because it strikes at the core of a fair trial, the consequences of such a constitutional violation can and should be examined carefully by this Court. Sawyer, 112 S.Ct. at 2520-22 (Under Due Process states "adopted various narrowing factors", thus courts must consider whether "aggravating circumstances" exist to justify convictions; "proof or disproof of aggravating circumstances" as required by Due Process is "confined by the statutory definitions").

In addition, the years of litigation defining what is a "deadly weapon" [11 Del.C. 222(5) of 1985], proves that the definition was so unclear (or too broad) at the time of Defendant's crime, that a "baseball bat" may be interpreted as either in or out of the "deadly weapon" category.<sup>(11)</sup> When faced with such ambiguity on a facet as critical as an element

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<sup>(11)</sup> The Synopsis to 68 Del. Laws c. 378 recognized this ambiguity (A-14).



of a crime, the courts may rule that such a statute is void for vagueness or the courts may add a clarifying gloss<sup>(12)</sup> to the statute and apply it prospectively only. But it would still violate Due Process for a court to apply that added and unforeseen precision retroactively, as the <sup>state</sup> courts did in this case. Lanzetta v. New Jersey, 59 S.Ct. 618, 620-21 (1939); Marks v. U.S., 97 S.Ct. 990, 994 (1977); U.S. v. Lanier, 117 S.Ct. 1219, 1225 (1997) (men of "common intelligence" "guess at meaning"); LeCompte, 538 A.2d at 1103 ("not foreseeable", "unique circumstances").

Due Process is violated whenever a conviction is based upon conduct that a statute, properly interpreted, does not prohibit. Under the Delaware General Assembly's specifically articulated intent<sup>(13)</sup>, Defendant could not have been guilty of the crimes for which he was convicted. When the General Assembly explained the language of the statutes,<sup>(14)</sup> the General Assembly revealed the "simple, inevitable conclusion" that Defendant's convictions violated Due Process or Ex Post Facto. Buckley v. Florida,

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(12) see Anderson and cases cited therein for twisted "loops" the state courts have had to "jump through" to clarify what was or what was not a "deadly weapon" (A-35).

(13) see Synopsis to 68 Del. Laws. c. 378 (A-14) ("common objects", "baseball bats", "loophole", "could not be convicted"); and DE Code Commentary (1973), p. 26 ("definition of 'deadly weapon' is more narrow", "Possession of a truly deadly weapon... more serious than possession of a dangerous instrument") and pp. 52-53 ("imposition of a deserved penalty no matter what penalty the other parties received", "allows one party to be convicted of first-degree... when the other's... [actions] makes him guilty only of second-degree").

(14) Id.

123 S.Ct. 2020, 2022 (2003), citing Fiore, 121 S.Ct. at 714, Jackson, 99 S.Ct. 2781, and In re Winship, 90 S.Ct. 1068.

Courts have repeatedly recognized the need to correct decisions of the Courts when their analysis was "incomplete," "too restricted" or "mistaken."<sup>(15)</sup> Since the analysis of Defendants' claims for relief in the state courts' decisions was "incomplete," "too restricted" or "mistaken," this Court may approach these claims for relief as if this were a clean slate, and grant the relief requested. see also Engle v. Isaac, 102 S.Ct. 1558, 1575-76 (1982) (to protect against fundamental miscarriages of justice procedural bars must yield to the imperative of correcting a fundamentally unjust incarceration); Buckley, 123 S.Ct. at 2022, footnote <sup>★</sup> (same).

Given the "subsequent legal developments" in the Court's 2003 decision of Buckley, it is clear that Defendants' "deadly weapon" based Weapon (A-4-5, Count 8) and Assaults (A-3-4, Counts 6, 7) convictions; and two "handgun" based Robbery First degree (A-1-2, Counts 2, 3) convictions, violates clear legislative intent, Delaware statutory law, and either the Ex Post Facto or Due Process clauses.

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<sup>(15)</sup> LeCompte v. State, 516 A.2d 898, 904 (Del. 1986) ("the analysis... was incomplete"); Williams v. State, 818 A.2d 906, 913 (Del. 2002) (analysis too restricted); Hamilton v. State, 831 A.2d 881, 887 (Del. 2003) ("mistaken").




68 Del. Laws c. 378; DE Code Commentary (1973), pp. 26, 52-53; 11 Del. C. 222(5), 274 (1985); U.S. Const. Art. I, sec. 10, Amend. 5, 6, 14; Buckley, 123 S.Ct. at 2021-23 (subsequent deadly weapon change in definition [11 Del. C. 222(5)] exposes existing Ex Post Facto and Due Process violations; and, liability limits [11 Del. C. 274] means that at time of crime, defendant was convicted of a crime - armed [Robbery] - for which he was not guilty, exposing existing Due Process violations).

For these reasons, Defendant requests that the writ of habeas corpus issue to vacate the Weapon and two Assault convictions and sentences; and reduce the two Robber First degree convictions to Robbery Second degree with remand to the state court for resentencing.

Date: August 5, 2005.

Respectfully submitted,

  
Joseph M. Walls

XC: Delaware Innocent Project